No. 15411.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN J. MOYLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

Hon. Harry C. Westover, Judge.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

Introduction.

This is an appeal from the final judgment denying the appellant any relief sought in the complaint. The suit was brought for breach of an express contract with the United States. The complaint contains two counts in contract and one count in *quantum meruit.*

Jursdictional Statement.

Jurisdiction of this suit in the District Court is conferred by 28 U. S. C., Section 1346 (a) (2), based on an express contract with the United States under which the amount in controversy does not exceed $10,000.00 in amount and the appellant is a resident of the City of Los

Angeles, County of Los Angeles, State of California. [Complaint, pars. I, II, III, R. 3; Ans., R. 7; Findings R. 12.]

A final judgment for appellee was entered October 24, 1956. [R. 15.]

Appellant's notice of appeal was filed December 7, 1956, within the statutory period. [R. 15.] Jurisdiction of this court is conferred under 28 U. S. C., Section 1291 (65 Stat. 726, Act of October 31, 1951).

Statement of the Case.

Appellant is a duly licensed freight forwarder engaged in business in the City of Los Angeles, State of California.

The Pacific Westbound Conference is an association of ocean carriers operating between the West Coast and the Orient.

General Services Administration is an administrative branch of the United States Government.

Prior to June, 1951, member carriers of the said Conference did not pay a brokerage fee to freight forwarders. Consequently government agencies entered into contracts with licensed freight forwarders for the handling of government shipments. In June, 1950, appellant submitted a low bid of 6½ cents per ton or a minimum charge of $7.50 per shipment and was awarded a contract with General Services Administration. The main reason for appellant's low bid was to get his name on the list of approved forwarders and demonstrate the quality of his work to the government. [R. 23.] This contract expired by its own terms on June 30, 1951.

In June 1951, this Conference Rule was changed and commencing July 1, 1951, freight forwarders were paid

a brokerage fee of 1¼% of the ocean freight charge on all shipments transported by member carriers. On July 3, 1951, appellant wrote to General Services Administration offering to perform forwarding services at no charge to the government in view of the fact that he would receive the said brokerage payment from the carrier. [Ex. 2.] On July 9, 1951, General Services Administration replied to appellant's letter and stated in substance that in view of the payment of said brokerage by the carrier to forwarders designated by the shipper no contract with the government was necessary, but the government would rotate their shipments among licensed forwarders. [Ex. 3.]

With this common understanding of the parties hereto as to the payment of brokerage by the carrier designated by the shipper, the appellee on or about July 15, 1956, requested appellant to act as its agent in performing forwarding services on appellee's shipments and continuously thereafter requested and used appellant's services as a forwarding agent until August, 1953. Appellant performed all services requested by appellee during this period and repeatedly demanded that appellee file with the said Conference a designation of the appellant as agent of the appellee. In lieu of filing the said designation appellee supplied appellant with various reasons as to why the designation could not be filed at that time, but promised that the matter would be straightened out. The main excuse of appellee for not filing said designation was the rule of said conference that appellant be designated as an agent who actually booked the cargo. Appellee insisted that it was the policy of the appellee to book its shipments and the appellee refused to either allow the appellant to book the cargo or credit the appellant with the booking.

Due to this refusal of the appellee to file said desigation the appellant was unable to collect earned brokerage fees in the amount of $8,543.72 from the member carriers.

Appellant submitted a claim to the appellee in the sum of $238.48 for postage expenses incurred in performing the said requested forwarding services on appellee's shipments. This claim was approved by the appellee and appellant was reimbursed in full for said expenses. Appellant also submitted a claim for compensation lost in the amount of $8,305.24 due to appellee's refusal to designate him as its agent. Appellee conceded that appellant had rendered valuable services to appellee and agreed to pay appellant on a *quantum meruit* basis. As a basis for determining the reasonable value of appellant's services the appellee referred to the rates paid appellant under the prior expired contract and offered appellant the sum of $1,881.10 in full settlement of his claim. Appellant refused this offer on the ground that reasonable compensation should be based first on the agreed rate of compensation, to wit, 1¼% of the ocean freight charge, or in the absence of such an agreement reference should be made to the cost to industry for similar services in the Los Angeles area. Appellee refused to offer more than the original sum of $1,881.10. In August, 1954, appellee changed its procedure by tentatively booking the cargo in Washington and allowing the freight forwarder to confirm the booking. Under this new policy appellee filed a designation of appellant as its agent with the said Conference in September, 1954, and from that date on appel-

lant has been paid brokerage by the member carriers on all shipments he forwarded for the appellee.

Appellant instituted the action herein to recover compensation lost by him during the period June, 1951, to August, 1953, due to the unjustified refusal of appellee to designate him as its agent.

Specifications of Errors.

The points upon which plaintiff appellant will reply on appear on pages 16 and 17 of the Printed Record.

1. The court erred in holding and deciding that appellant and appellee did not enter into any contract concerning the subject matter of this action.
2. The court erred in holding and deciding that appellant performed certain forwarding services on shipments of the appellant with the knowledge, approval and consent of the appellant.
3. The court erred in holding and deciding that the reasonable value of the services which appellant performed for the benefit of appellee is the sum of $1,881.10.
4. The court erred in holding and deciding that no sum is presently due by appellee to appellant for services performed by appellant for appellee.
5. The court erred in holding and deciding that appellant shall take nothing by this action.

Summary of Argument.

On the contract counts appellant's argument is fourfold.

1. General Services Administration had authority to use the services of appellant as a private freight forwarder.
2. In view of the common understanding of the parties as to payment of brokerage, the acts of appellee in requesting appellant to act as its agent in performing forwarding services and the performance by appellant of said requested services formed a unilateral contract or a series of unilateral contracts between appellant and appellee.
3. Appellee committed a breach of contract.
4. The correct measure of damages for breach of contract is the amount of profits lost by appellant as a direct result of said breach.

On the *quantum meruit* count, the argument is threefold:

1. Appellee concedes that appellant is entitled to *quantum meruit* recovery.
2. Reasonable value for requested services rendered should be based on the agreed rate of compensation under which said services were performed, or, in the absence of such an agreement, reasonable value should be determined by the cost to industry in the same locality.
3. The Appellate Court may reverse the findings of the lower court as to reasonable value.

ARGUMENT.

Appellee Had Authority to Use the Services of Appellant as Its Forwarding Agent.

In the court below appellee attempted to defend the charge of breach of contract on the ground that the officer of General Services Administration who requested said services was not a contracting officer and had no authority to bind the appellee.

The Bland Act, 46 U. S. C., Section 1127 (56 Stat. 176) and United States Maritime Board, General Order 70, Amendment 2, Section 243.2 Regulations, authorize and require General Services Administration to use the services of private freight forwarders.

Title 41, U. S. C., Section 252, authorizes General Services Administration to negotiate contracts without advertising providing the aggregate amount involved does not exceed $1,000.00, or the contract is for personal or professional services.

Mr. Salisbury, Director, Storage and Transportation Division of General Services Administration was charged with the duty of dispatching shipments of said agency and in such capacity had authority to designate the carrier and forwarding agent for each shipment. By requesting appellant to act as forwarding agent said officer did not bind appellee to pay for the cost of appellant's services, but did bind the appellee to perform any and all obligations arising from performance of the requested acts. The fact that appellee subsequently became liable to appellant because of its refusal to fulfill said obligations, does not negate the original authority of the officer of the appellee.

American Jurisprudence states the general rule applicable to contracts with the United States.

> "The formation of contracts between private individuals and the Federal government is governed by the same principles which govern formation of contracts between private persons."
>
> 54 Am. Jur. 572, Sec. 62.

> "But it is only liable upon those contracts entered into by its duly authorized officers or agents, where such officers or agents are acting within the scope of their authority on behalf of the government."
>
> 54 Am. Jur. 66, Sec. 93.

The argument of counsel for appellee that Mr. Salisbury had no authority to bind appellee is without merit. Appellee paid the charges of the carriers selected by said officer and also paid appellant's claims for expenses incurred in forwarding said shipments. It is illogical to contend that in the same transaction an officer has authority to bind appellee to pay the carrier and the expenses of the forwarding agent, but has no authority to bind appellee for compensation of the forwarding agent in handling the shipment.

In the case of *Smale and Robinson, Inc. v. United States* (1954), 123 F. Supp. 457, District Judge Mathes stated:

> "Acts or omissions of agents lawfully authorized to bind the United States, or *direct its course of conduct* during a particular transaction will work estoppel against the government if agents acted within the scope of their authority."

In the case of *Southern Pacific Co. v. United States,* 192 F. 2d 438, Judge Goodrich stated:

> "Where army transportation officer had charge of shipping obsolete army equipment sold by War Assets Administration, officer had *incidental authority.*"

Further refutation of appellee's arguments can be found in the fact that General Services Administration continues to employ private freight forwarders on the same basis. If the acts of Mr. Salisbury were unauthorized when he employed appellant as an agent, why does appellee continue to use the same procedure?

Appellee's Promise for an Act Plus Appellant's Performance of the Act Formed a Unilateral Contract.

The common understanding of the parties that appellant would receive brokerage from the carrier as an agent designated by the shipper is found in appellant's letter of July 3, 1951 [Ex. 2], and appellee's reply. [Ex. 3.] In view of this meeting of the minds the performance by the appellant of each act requested by appellee constituted an acceptance of appellee's offer for an act.

American Jurisprudence sets forth a clear definition of the rule of formation of a contract by performance of an act:

> "In reference to the sufficiency of an acceptance, there is a distinction between an offer to make a contract executory on both sides and an offer of promise for an act. In the latter case the only acceptance of the offer that is necessary is the performance of the act. In other words, the promise becomes binding when the act is performed."
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> 12 Am. Jur. 537, Sec. 43.

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> 12 Am. Jur. 537, Sec. 43.

In the case of *United States v. Smoot,* 15 Wall. 36, 82 U. S. 107, Mr. Justice Miller, speaking for a unanimous court, stated:

> "This court will not apply to contracts made by the government, nor give to its action under such contracts, a construction and effect different from those which courts of justice apply to contracts between individuals."

Appellee Committed a Breach of Contract.

The Rules of the Pacific Westbound Conference require that an agent, in order to collect brokerage, must be designated by the shipper as an agent authorized to book the cargo. [Ex. 13.] Appellee's knowledge of this Rule is found in the letter of July 9, 1951 [Ex. 3], wherein appellee stated in part: "Conference carriers now pay brokerage to Freight Forwarders as designated by the shipper." Upon the formation of each unilateral contract as above stated appellee became obligated to perform its part by designating appellant as its agent authorized to book the cargo. Appellee had the choice of altering its policy by permitting appellant to confirm the booking or in the alternative crediting appellant with the actual booking. Instead appellee remained adamant in its bureaucratic policy of refusing to perform its obligations, claiming that it would violate the policy of General Services Administration. The fact that this procedure was changed in 1954 by the addition of the word "tentative" to a booking of cargo in Washington, demonstrates forcibly that such procedure was not impossible during the period 1951 to 1954.

American Jurisprudence clearly defines the duty of the appellee:

> "The United States must do whatever is necessary on its part to enable the other contracting party to

comply with the terms of the contract and if it fails to do so, it is liable to the other party for such damages assuming that it has given consent to be sued in the circumstances."

54 Am. Jur. 583, Sec. 69.

California Jurisprudence states the rule of compensation of an agent:

"A broker, as an agent, ordinarily looks to the principal for compensation. However, the employment contract may provide that the broker is to look to the other side for his compensation. In such a case, the principal is under no obligation to see that the broker is paid for his services unless the principal renders it impossible for the broker to become entitled to payment by the other side by wrongfully refusing to perform the contract negotiated."

9 Cal. Jur. 218, Sec. 64.

In the instant case appellant looked to the carrier for his compensation. However, due to the unjustified refusal of appellee to file the required designation it became impossible for appellant to collect his brokerage from the carrier. Due to this breach of contract appellee became liable to appellant for the brokerage earned by appellant.

The trial judge commented on the failure of the appellee to designate appellant as its agent:

"The Court: All the government had to do was give the authority. It didn't cost the government a cent to give this authority. They sit back and don't do anything for three years. Why?

Mr. Lavine: At that time they had not adjusted their procedures so that they wanted to give him that authority or any other agent so situated." [R. 41.]

Commenting on the refusal of the steamship companies to pay the 1¼% brokerage to appellant, the court said:

> "The Court: But they didn't pay it to the plaintiff because the government sat on its hands and wouldn't give this authorization. Is the plaintiff supposed to lose this money because the government did that?" [R. 44.]

Measure of Damages for Breach of Contract.

Speaking for a unanimous court, Mr. Chief Justice Waite in the case of *United States v. Smith,* 94 U. S. 214, 24 L. Ed. 115, stated:

> "When a breach of contract interferes with the proper performance of a contract in accordance with its terms, the injured party may recover damages to the extent at least of any loss which was the necessary consequence of such interference."

See, also:

Parish v. United States, 100 U. S. 500, 25 L. Ed. 763;

United States v. Barlow, 184 U. S. 123, 22 S. Ct. 468.

Appellee Concedes That Appellant Is Entitled to Quantum Meruit Recovery.

At the trial counsel for appellee conceded as follows:

> "Mr. Lavine: The government does not think he should go without any compensation, and it is on that basis that we grant he is entitled to *quantum meruit* recovery." [R. 42.]

> "The Court: The government is willing to admit that the plaintiff is entitled to something?
>
> Mr. Lavine: Yes." [R. 43.]

Reasonable Value Should Be Determined by a Consideration of All the Evidence and Surrounding Circumstances.

For the obvious reason that plaintiff's bid under the expired contract was the lowest price available, the government employed this basis in determining the reasonable value of appellant's services between 1951 and 1953.

The prevailing rule of law is that the reasonable value of the services rendered by appellant at the request of appellee should be based on the agreed rate of 1¼% which was the agreed rate of compensation, or, in the absence of such an agreement, reasonable value of appellant's services should be determined by reference to the cost to industry for similar services in the same area. In the instant case the common understanding of the parties as to the rate of compensation to be paid appellant is shown in Plaintiff's Exhibits 2 and 3.

In deciding the question of reasonable value in the case of *Clark v. United States,* 95 S. Ct. 539, 24 L. Ed. 518, Mr. Justice Bradley stated:

> "Value for the use of vessel per day, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract."

In *Pacific Maritime Association v. United States,* 123 Ct. Cl. 667, 108 F. Supp. 603, Judge Whitaker answering the question: "What is fair compensation?" stated:

> "No better answer to the question of what is fair compensation, than what the parties agreed upon, to wit, 1.7 cents per hour."

At the trial appellee contended that recovery by the appellant should be measured by the benefit conferred on the appellee. California Jurisprudence clearly and decisively refutes this contention:

> "What is a reasonable compensation for the services rendered does not depend on any one factor but must be ascertained from all the evidence and circumstances of the case."
>
> 27 California Jurisprudence 238, Sec. 44.

See, also:

> 2 Am. Jur. 244, Sec. 311;
>
> 58 Am. Jur. 518, Sec. 10.

In *Gray v. Cheatham,* 52 S. W. 2d 762, 763, the court held:

> "Reasonable value of services rendered would be what was the reasonable price paid for such service or like services in the community where such services or like services were rendered."

The rate of brokerage commonly paid for forwarding services in the PWC is 1¼% of the ocean freight charge. [R. 30; Pltf. Ex. 23.]

The Reviewing Court May Reverse the Finding of the Trial Court as to Reasonable Value of Appellant's Services.

In *United States v. U. S. Gypsum Co.,* 333 U. S. 364, 92 L. Ed. 746, Mr. Justice Reed stated:

> "The Supreme Court may, under the provision of Rule 52(a) * * * reverse a finding of fact in an action so tried where although there is evidence to support the finding, the reviewing court on the entire

evidence is left with a definite and firm conviction that a mistake has been committed."

In holding for the government, the trial judge failed to consider the correspondence between the parties which clearly shows the common understanding of the parties as to the rate of compensation to be paid appellant. Further, the trial judge refused to give credence to the uncontradicted testimony of the plaintiff.

Referring to the services rendered between 1951 and 1953 appellant testified:

"Q. (By Mr. Gately): Did you perform all these requested services expecting compensation? A. Yes, I did.

Q. What compensation did you expect? A. I expected to receive 1¼ per cent of the ocean freight.

Q. For each shipment did GSA send you instructions how to handle it? A. Yes. Each shipment was a separate set of instructions.

Q. Did they mention anything about the capacity in which you were acting? A. Yes. We were their designated forwarding agent.

Q. Did you fully perform all the requested services during this period? A. Yes, I did.

Q. Did you believe at any time you were working under the ratef of the expired contract? A. Never."

Finally the trial judge failed to consider the cost to industry for similar services in the Los Angeles area. [Pltf. Ex. 23.]

If this honorable Court upholds the decision of the lower court the rule will be established in the Ninth Circuit

that reasonable value should be determined by the lowest charge or price for which plaintiff ever performed similar services.

Conclusion.

The judgment below should be reversed and appellant should be awarded a judgment against appellee for $8,305.00.

Respectfully submitted,

THOMAS J. GATELY,

Attorney for Appellant.